(14)

No. 96-552

In the

Supreme Court of the United States

October Term, 1996

RACHEL AGOSTINI, et al.,
Petitioners,

v.

BETTY-LOUISE FELTON, et al.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

Whether this Court should overrule its decision in *Aguilar v. Felton*, 473 U.S. 402 (1985), which held that the Establishment Clause prohibits the furnishing of Title I remedial services to eligible parochial school children in the same setting as their public school counterparts--on the premises of the schools they attend.

Whether Rule 60(b) of the Federal Rules of Civil Procedure is a proper vehicle for obtaining the relief petitioner seeks.

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INTEREST OF AMICUS CURIAE

Pursuant to United States Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioners Rachel Agostini, *et al.* Written permission from all parties to file this brief has been lodged with the Clerk of the Court.

PLF is a nonprofit, tax-exempt organization incorporated under the laws of California for the purpose of participating nationally in litigation matters affecting the public interest. PLF has over 25,000 supporters nationwide. PLF policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. The Board of Trustees has authorized the filing of a brief amicus curiae in this matter. PLF has a long-standing interest in cases arising under the First Amendment to the United States Constitution. For example, PLF attorneys were the attorneys of record in *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *Smith v. Regents of the University of California*, 4 Cal. 4th 843 (1992), *cert. denied*, 510 U.S. ___, 114 S. Ct. 181 (1993). PLF also participated as amicus curiae in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991), *Rosenberger v. Rector and Visitors of the University of Virginia*, ___U.S.___, 115 S. Ct. 2510 (1995), and *Glickman v. Wileman Brothers & Elliott, Inc.*, No. 95-1184.

PLF believes that its public policy perspective and litigation experience will provide an additional viewpoint on the issues presented in this case. Specifically, PLF will advocate the overturning of both Aguilar v. Felton and *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and urge this Court to uphold governmental programs, such as the one at issue in this case, that provide a benefit to a large group of people in a manner that is neutral toward religion.

OPINIONS BELOW

Both the District Court's Order and the Second Circuit Court of Appeals' Summary Order are unreported. The opinions are attached to the appendix to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

In 1985, this Court used the Establishment Clause of the First Amendment to the United States Constitution[1] to strike down an educational program that had admittedly "'done so much good and little, if any, detectable harm.'" *Aguilar v. Felton*, 473 U.S. 402, 415 (1985) (Powell, J., concurring) (quoting *Felton v. Secretary, United States Department of Education*, 739 F.2d 48, 72 (2d Cir. 1984). Title I of the Elementary and Secondary Education Act disperses federal funds to local school districts in order to meet the educational needs of children from low-income families. Beginning in 1966, and pursuant to congressional intent, 20 U.S.C. § 632(a), New York City used Title I funding to provide educational assistance to parochial school children in parochial school classrooms. Under the New York program, public school teachers who volunteered to teach in parochial schools, would teach such secular subjects as remedial reading, remedial skills, remedial mathematics, and English as a second language.

The city took reasonable steps to ensure that this needed educational program did not run afoul of the Establishment Clause. The public school teachers were told to avoid becoming involved with religious activities that

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[1] The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion ...." U.S. Const. Amend I.

occurred on the parochial school grounds and to bar religious materials from the classroom. In addition, the parochial schools were required to remove all religious symbols from the classroom before the public school teachers arrived. To ensure compliance with these polices, the teachers were monitored by field personnel, who attempted to visit each classroom once a month. These field supervisors reported to program coordinators who also made unannounced visits to the parochial school classrooms.

Despite these safeguards, this Court found that New York's program violated the Establishment Clause. *Aguilar*, 473 U.S. at 414. Employing the doctrinal framework first articulated in *Lemon v. Kurtzman*,[2] this Court concluded that the supervisory system used by New York "inevitably results in the excessive entanglement of church and state." *Aguilar*, 473 U.S. at 409. In holding that the monitoring and supervision of teachers resulted in the excessive entanglement of church and state the Court took "advantage of [a] 'Catch-22' paradox of its own creation, whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement." *Id.* at 420 (Rehnquist, J., dissenting). Moreover, any unwarranted entanglement in the case was merely hypothetical given that the evidence demonstrated that "'in 19 years there has never been a single incident in which a Title I instructor 'subtly or overtly' attempted to 'indoctrinate the students in particular religious tenets at public expense.'" *Id.* at 424 (O'Connor, J., dissenting).

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[2] Under the *Lemon* test in order to survive attack under the Establishment Clause a statute must: (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) not excessively entangle the government in religion. *Lemon v. Kurtzman*, 403 U.S. at 612-13.

The *Aguilar* decision has been criticized by both commentators and members of this Court. In 1994, less than a decade after the decision was rendered, five members of this Court explicitly called for a reconsideration of the *Aguilar* decision. "The court should, in a proper case, be prepared to reconsider *Aguilar*, in order to bring our Establishment Clause jurisprudence back to what I think is the proper track--government impartiality, not animosity, towards religion." *Board of Education of Kiryas Joel Village School District v. Grumet*, __U.S. __, 114 S. Ct. 2481, 2498 (1994) (O'Connor, J., concurring). "The decisions in *Grand Rapids* [*School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985)] and *Aguilar* may have been erroneous. In light of the case before us, and in the interest of sound elaboration of constitutional doctrine, it may be necessary for us to reconsider them at a latter date." *Grumet*, 114 S. Ct. at 2505 (Kennedy, J., concurring). "I heartily agree that these cases, [*School District of Grand Rapids v. Ball*, 473 U.S. 373, and *Aguilar*] so hostile to our national tradition of accommodation, should be overruled at the earliest opportunity." *Grumet*, 114 S. Ct. at 2515 (Scalia, J., dissenting) (joined by the Chief Justice and Justice Thomas).

In 1995, the petitioners initiated this case by filing a motion for relief pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. This motion was based on the fact that five Justices had expressed their desire to reconsider and overrule *Aguilar*. Although the District Court denied the motion it noted that the petitioners "should be permitted to seek the reconsideration of *Aguilar* that a majority of the Supreme Court appears willing, if not anxious, to undertake." Petition for a Writ of Certiorari at 10a (quoting Memorandum and Order 78-CV-1750 (JG)). The Second Circuit Court of Appeals summarily affirmed the District Court's order.

On January 17, 1997, this Court granted the writ of certiorari in order to consider the following questions: (1) Whether this Court should overrule its decision in *Aguilar v. Felton*, and (2) "Whether Rule 60(b) of the Federal Rules of Civil Procedure is a proper vehicle for obtaining the relief Petitioner seeks."[3] 473 U.S. 402.

SUMMARY OF ARGUMENT

This Court granted the petition for writ of certiorari in this case, in part, to determine whether the decision in *Aguilar v. Felton* was erroneous. The *Aguilar* decision was the unfortunate by-product of an earlier decision of this Court. In *Lemon v. Kurtzman*, this Court articulated a three-part test to evaluate possible Establishment Clause violations. Applying the *Lemon* framework in *Aguilar*, this Court concluded that New York City's Title I funding program violated the Establishment Clause because it resulted in the excessive entanglement of church and state. In reconsidering *Aguilar*, this Court should also reconsider the source of that unfortunate decision; *Lemon v. Kurtzman*. Instead of applying, and as a result compelling lower courts to apply, the *Lemon* test in Establishment Clause cases, this Court should evaluate governmental programs challenged under that clause to ascertain whether they are neutral toward religion.

The *Lemon* test should be overruled for a number of reasons. The test has led to inconsistent, and often inexplicable results. The use of this test has created a bizarre judicial landscape where, for example, government is free to lend text books to religious schools, but it is not free to lend maps, or similar educational materials to those same schools. The strange results caused by the *Lemon* test are more than

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[3] Pacific Legal Foundation takes no position on the propriety of using Rule 60(b) to obtain the requested relief.

adequately demonstrated by the facts of this case, where public school teachers are barred from entering parochial school classrooms in order to provide instruction in such nonreligious subjects as math and reading, but those same teachers can give those same lessons to those same parochial school children so long as they provide this instruction in a van parked off the parochial school grounds.

Lemon should also be overruled in order to provide a uniform framework for the evaluation of claims brought under the Establishment Clause. The *Lemon* mode of analysis has not been formally repudiated by this Court; however, recent decisions have failed to rely on the test. Instead of funneling Establishment Clause claims through the familiar three prongs of *Lemon*, this Court has instead asked whether the government's action endorses religion, coerces people into religious participation, or acts neutrally toward religion. Although this Court appears to have abandoned the *Lemon* test, lower courts continue to apply that framework. A two-tiered system of Establishment Clause jurisprudence has emerged, with this Court applying one standard of review and the lower courts applying a very different mode of analysis. The overruling of *Lemon* would establish a uniform standard of constitutional review.

In recent Establishment Clause cases, this Court has explained that government programs that neutrally provide benefits to a large class of citizens do not offend the First Amendment simply because a religious institution might receive a benefit. This Court should expressly declare that the neutrality test, and not the test announced in *Lemon*, should be used to determine whether the Constitution has been violated . The Title I program, as it is administered by New York City, provides a neutral benefit to a large group of similarly situated school children. The program neither discriminates against, nor favors, children that happened to attend parochial schools.

Rather, it treats these students the same way it treats their public school counterparts. Because this program neutrally provides a benefit to the educationally deprived children of New York it does not violate the Establishment Clause.

ARGUMENT

I

THIS COURT SHOULD OVERRULE *LEMON V. KURTZMAN*

This Court's Establishment Clause jurisprudence is in "hopeless disarray." *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. at 2532 (Thomas, J., dissenting). Undoubtably, the overruling of *Aguilar* will go a long way toward restoring some semblance of order to this area of the law. The erroneous *Aguilar* decision is, however, symptomatic of a larger problem; the three-part test announced in *Lemon v. Kurtzman*. The Court in *Aguilar* applied the *Lemon* test and concluded that the New York Title I program caused the excessive entanglement of church and state. *Aguilar*, 473 U.S. at 409. Although the New York Title I program provided a neutral benefit to all similarly situated school children, the *Aguilar* court found that this program was inconsistent with the command of the Establishment Clause. *Id.* at 414. As with *Aguilar*, members of this Court have called for the repudiation of the *Lemon* decision. "Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's [*Lemon*] heart, and a sixth has joined an opinion doing so." *Lamb's Chapel v. Center Moriches Union Free*

School District, 508 U.S. 384, 398 (1993) (Scalia, J., dissenting).[4]

For the reasons that follow this Court should explicitly overrule both *Aguilar* and *Lemon* and put an end to "the strange Establishment Clause geometry of crooked lines and wavering shapes" these cases have produced. *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. at 399 (Scalia, J., dissenting).

A. The Application of the Lemon Test Has Led to Inconsistent and Confusing Results

The three-pronged *Lemon* test has been the subject of criticism ranging from the horrific[5] to the (semi) comical.[6] The

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[4] Citing *Lee v. Weisman*, 505 U.S. 577, 631 (1992) (Scalia, J., joined by Thomas, J., dissenting); *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 655-57 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 346-49 (1987) (O'Connor, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 107-13 (1985) (Rehnquist, J., dissenting); *Wallace*, 472 U.S. at 90-91 (White, J., dissenting).

[5] "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening little children and school attorneys of Center Moriches Union Free School District."

(continued...)

doctrine's harshest critics, however, have been the members of this Court. "Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional." *Edwards v. Aguilar*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting). "If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it." *Wallace v. Jaffree*, 472 U.S. at 112 (Rehnquist, J., dissenting).

The bulk of criticism leveled at the *Lemon* test focuses on the inconsistent decisions spawned by the application of this test. Cases decided under *Lemon* are not only inconsistent with each other, they also contradict cases decided prior to the adoption of the test. Nowhere has this inconsistency been greater than in the area of religious schools. Twenty-five years after the announcement of the *Lemon* test we know that it is constitutional for the government to pay for bus transportation to and from parochial schools. *Everson v. Board of Education*

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[5](...continued)
Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. at 398 (Scalia, J., dissenting).

[6] Jill M. Misage, *Refusing to Abandon a Real Lemon of a Test*, 28 Wake Forest L. Rev. 775 (1993); Derrick R. Freijomil, *Has the Court Soured on Lemon? A Look into the Future of Establishment Clause Jurisprudence*, 5 Seaton Hall Const. L.J. 141 (1994); Michael W. McConnell, *Stuck with a Lemon*, A.B.A. J. at 46 (Feb. 1997); Scott S. Thomas, *Beyond a Sour Lemon: A Look at Grumet v. Board of Education of the Kiryas Joel Village School District*, 8 B.Y.U. J. Pub. L. 531 (1994); Pat Robertson, *Squeezing Religion Out of the Public Square--the Supreme Court, Lemon, and the Myth of the Secular Society*, 4 Wm. & Mary Bill of Rights J. 223 (1995).

of the Township of Ewing, 330 U.S. 1, 17 (1947). However, it is unconstitutional for the state to fund bus transportation from parochial schools to museums, or other school field trip destinations. *Wolman v. Walter*, 433 U.S. 229, 252-55 (1977). Similarly, the Establishment Clause does not bar the state from loaning text books to children attending religious schools, *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236, 238 (1968), so long as the state does not lend workbooks in which the parochial school children write. *Wallace*, 472 U.S. at 110 (Rehnquist, J., dissenting) (citing *Meek v. Pittenger*, 421 U.S. 349, 354-55 (1975)). The Establishment Clause does bar the state from lending maps to children attending religious schools. *Wolman*, 433 U.S. at 249. Although there is no constitutional objection to public schools releasing students during the school day to receive religious instruction, *Zorach v. Clauson*, 343 U.S. 306 (1952), the Constitution does bar public school teachers from teaching secular subjects in parochial school classrooms. *School District of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

One need look no further than the facts of this case to see the strange results the *Lemon* test has generated. In *Aguilar* the Court held that public school teachers could not teach secular subjects in parochial classrooms. This ruling forced school districts throughout the nation to dream up creative ways to provide sorely needed educational assistance to children attending parochial schools. These solutions included the use of mobile instructional units or vans parked off the parochial school grounds and the use of computer assisted instruction. In essence, *Aguilar* stands for the proposition that the Establishment Clause is not violated when a public school teacher provides assistance to a parochial school student, so long as the teacher does not provide that instruction on the grounds of the parochial school. It is difficult to see how one of these methods of instruction might lead to the establishment

of one national religion, while the other method presents no such danger.

Recognizing the confusion that *Lemon* has caused, members of this Court have suggested that the test be replaced by a more workable, unified standard. "As the Court's opinion today shows, the slide away from *Lemon's* uritary approach is well under way. A return to *Lemon*, even if possible, would likely be futile, regardless of where one stands on the substantive Establishment Clause questions." *Board of Education of Kiryas Joel Village School District v. Grumet*, 114 S. Ct. at 2500 (O'Connor, J., concurring). "I will decline to apply *Lemon*--whether it validates or invalidates the government action in question--and therefore cannot join the opinion of the Court today." *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. at 399-400 (Scalia, J., concurring in the judgment). Reconsideration of the *Aguilar* decision provides this Court with an opportunity to take stock of its Establishment Clause jurisprudence. This Court should take full advantage of this opportunity by expressly overruling *Lemon v. Kurtzman*.

B. Lemon's Uncertain Status Has Created a Two-Tiered System of Establishment Clause Jurisprudence

The status of the *Lemon* test has been the subject of much speculation in recent years.[7] Although the test has not received

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[7] *Compare*, Michael Stokes Paulsen, *Lemon Is Dead: Religion and the Public Schools After Lee v. Weisman*, 43 Case W. Res. L. Rev. 795 (1993), *with*, Daniel O. Conckle, *Lemon Lives: Religion and the Public Schools After Lee v. Weisman*, 43 Case W. Res. L. Rev. 865 (1993); Richard S. Myers, *A Comment on*

(continued...)

a formal eulogy from this Court, it has lapsed into an extended period of disuse. Instead of applying the *Lemon* analysis in cases raising the Establishment Clause, this Court has instead asked whether the governmental action is neutral towards religion, *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. at 2521, whether the government's action coerces anyone to support or participate in a religious exercise, *Lee v. Weisman*, 505 U.S. at 587, or whether the government's action could be viewed as an endorsement of a particular religious belief or message. *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*. The *Lemon* doctrine has been highly criticized and infrequently used by this Court, yet, somehow it has managed to survive. "Lemon, however frightening it might be to some, has not been overruled." *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. at 395 n.7. "I write separately only to note my disagreement with any suggestion the today's decision signals a departure from the principles described in *Lemon v. Kurtzman*." *Board of Education of Kiryas Joel Village School District v. Grumet*, 114 S. Ct. at 2494 (Blackmun, J., concurring). "Thus we do not accept the invitation of petitioners and *amicus* the United States to reconsider our decision in *Lemon v. Kurtzman*." *Lee*, 505 U.S. at 587.

Although *Lemon* has fallen out of favor with this Court, it is still routinely applied by lower state and federal courts which are required to apply the three-part test until it is expressly overruled by this Court. The uncertainty surrounding the applicability of *Lemon* has led to a two-tiered system of Establishment Clause jurisprudence, with lower courts applying the *Lemon* framework and this Court applying a different test.

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[7](...continued)
the Death of Lemon: Religion and the Public Schools After Lee v. Weisman, 43 Case W. Res. L. Rev. 903 (1993).

The discordant results achieved by this split level system can be seen by evaluating this Court's most recent Establishment Clause cases.

Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993), involved a challenge by a deaf student to a school district's refusal to provide him with a sign-language interpreter to translate in a Roman Catholic high school. The school district contended that the Establishment Clause prohibited it from providing the requested interpreter. The Ninth Circuit Court of Appeals applied the *Lemon* test and concluded that because the interpreter would have the primary effect of advancing religion, the placement of the interpreter in the parochial school would violate the Establishment Clause. *Zobrest*, 509 U.S. at 6 (citing *Zobrest*, 963 F.2d 1190 (9th Cir. 1992)). This Court granted certiorari and reversed finding that because the interpreter was a neutral benefit available to all handicapped children in the school district, regardless of the sectarian or nonsectarian nature of their school, the Establishment Clause was not violated.

> When the government offers a neutral service on the premises of a sectarian school as part of a general program that "is in no way skewed towards religion" it follows under our prior decisions that provision of that service does not offend the Establishment Clause.

Zobrest, 509 U.S. at 10 (quoting in part *Witters v. Washington Department of Services for Blind*, 474 U.S. 481, 488 (1986)).

A similar analysis was employed in *Board of Education of Kiryas Joel Village School District v. Grumet*, 114 S. Ct. at 2481. There, taxpayers brought an action challenging the constitutionality of a New York statute that created a special school district for members of the Satmar Hasidim religion.

The state trial court found that the statute failed all three prongs of the *Lemon* test, therefore, violating the Establishment Clause. *Grumet*, 114 S. Ct. at 2487 (citing *Grumet v. New York State Education Department*, 579 N.Y.S.2d 1004 (1992)). The Appellate Division affirmed finding that the statute had the primary effect of advancing religion, *id.* (citing 592 N.Y.S.2d 123 (1992), and state Court of Appeals agreed. *Id.* 81 N.Y.2d 518, 601 N.Y.S.2d 61, 618 N.E.2d 94 (1993)).

This Court chose not to apply the *Lemon* test, but instead rested its decision on the fact that the statute in question extended a governmental benefit in a nonneutral fashion. Although this Court ultimately agreed with the conclusions of the three lower courts, it did so by employing a different analysis.

> One aspect of the Court's opinion in this case is worth noting: Like the opinions in two recent cases, *Lee v. Weisman*; *Zobrest v. Catalina Foothills School District*, and the case I think is most relevant to this one, *Larson v. Valente*, the Court's opinion does not focus on the Establishment Clause test we set forth in *Lemon v. Kurtzman*.

Grumet, 114 S. Ct. at 2498 (O'Connor, J., concurring) (citations omitted).

The inefficiency of using one test throughout the lower courts, only to change the analysis when the case reaches the Nation's highest court, was not lost on the dissenting Justices.

> [T]he Court's snub of *Lemon* today (it receives only two "see also citations, in the course of the opinion's description of *Grendal's Den*) is particularly noteworthy because all three courts

> below (who are not free to ignore Supreme Court precedent at will) relied on it, and the parties (also bound by our case law) dedicated over 80 pages of briefing to the application and continued vitality of the *Lemon* test. In addition to other sound reasons for abandoning *Lemon* it seems quite inefficient for this Court, which relies heavily on the briefing of the parties and, to a lesser extent, the opinions of lower courts, to mislead lower courts and parties about the relevance of the *Lemon* test.

Id. at 2515 (Scalia, J., dissenting).

A case decided during the 1994-95 term arrived at the Court in similar fashion. In *Rosenberger v. Rector and Visitors of the University of the Virginia*, a student Christian newspaper filed suit against the University of Virginia claiming that the University's decision to deny student funds constituted impermissible viewpoint discrimination in violation of the First Amendment's Free Speech Clause. The University defended its denial of funding by claiming that allowing student funds to flow to a religious newspaper would violate the First Amendment's Establishment Clause. The Court of Appeals ruled for the University, finding that its discriminatory funding practices were justified by the "compelling interest in maintaining strict separation of church and state." *Rosenberger*, 115 S. Ct. at 2516 (quoting *Rosenberger v. Rector and Visitors of the University of Virginia*, 18 F.3d 279-81 (4th Cir. 1994). In making this determination the lower court relied upon the three-part *Lemon* test and found that the funding of a religious newspaper would excessively entangle the University with the propagation of the Christian religion.

When the case reached this Court, however, the standard of review employed to detect a violation of the Establishment Clause changed dramatically. Instead of attempting to ascertain whether state and church had become impermissibly entangled, this Court simply assured itself that the governmental program was neutral toward religion. "A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Rosenberger*, 115 S. Ct. at 2521. Satisfied that the funding scheme was neutral toward religion, the Court concluded that funding of the Christian paper was not prohibited by the Establishment Clause. *Id.* at 2522.

In each of these cases the lower courts reviewed the Establishment Clause issue under the *Lemon* test, and in each of these cases this Court employed a different standard of review to determine whether that clause had been violated.[8] Nor do these cases represent isolated incidents, all of the federal Circuit Courts of Appeals and numerous state Supreme Courts have concluded in the past few years that the *Lemon* test remains the law. Michael W. McConnell, *Stuck with a Lemon, A New Test for Establishment Clause Cases Would Help Ease Current Confusion*, A.B.A. J. at 47. Not only is this dual regime inefficient and confusing for courts and attorneys, it also makes the level of constitutional protection vary depending on the procedural posture of each case. Recent decisions of this Court seem to suggest that the Court has abandoned the *Lemon* method of constitutional analysis; lower courts, however, do not enjoy this luxury. Until this Court expressly declares that *Lemon* is no longer the law, courts throughout the county will continue to scrutinize fact patterns in search of secular purposes, primary effects, and excessive entanglements.

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[8] Compare, however, *Lamb's Chapel*, 508 U.S. at 395, where this Court applied *Lemon*, even though the lower court had neglected to mention it.

This Court should explicitly overrule *Lemon* in order to end the current two-tiered system of Establishment Clause jurisprudence. This Court should also overrule *Aguilar* and hold that so long as the government provides benefits in a neutral manner, the Establishment Clause is not offended merely because a religious institution might be one of the recipients of this benefit.

II

THE DISTRIBUTION OF A GENERAL GOVERNMENTAL BENEFIT IN A NEUTRAL FASHION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

When the government offers a neutral service that is not designed to help religion, the evil sought to be avoided by the Establishment Clause, the establishment of a national church, is simply not implicated. The First Amendment prohibits government from ***favoring*** religion, it does not, however, require government to ***discriminate*** against religion. "The Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools." *Grumet*, 114 S. Ct. at 2498 (O'Connor, J., concurring). The neutrality test ensures that the government does not favor a particular religion, *see Grumet*, 114 S. Ct. at 2494, at the same time, the test does not force government to discriminate against religious institutions.

The Establishment Clause sets forth a simple mandate, when government inevitably interacts with religion, it must remain neutral in its dealings with the church. Because New York's--as well as Congress'--desire to use Title I moneys to allow public school teachers to teach in parochial school classrooms evidences neither favoritism nor hostility towards religion, but is instead a neutral program, it does not violate the Establishment Clause.

It has long been recognized by this Court that the First Amendment requires the government to remain neutral toward religion.

> That amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

Everson v. Board of Education of the Township of Ewing, 330 U.S. at 18. More recently, the Court has guarded against Establishment Clause violations by determining whether the challenged government program was neutral in its dealings with religion. "[W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit." *Zobrest*, 113 S. Ct. at 2466. "But the principle [neutrality] is well grounded in our case law, as we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges." *Grumet*, 114 S. Ct. at 2491.

The Title I program at issue in this case is part of a general governmental program designed to distribute benefits equally to a large class of citizens. Title I authorizes the Secretary of Education to disperse funds to local school districts in order to help meet the needs of educationally deprived children. The City of New York makes the benefits of this program to all eligible children, neither favoring nor discriminating against children attending parochial schools. As with the sign-language interpreter in *Zobrest*, here the state

is simply offering "a neutral service on the premises of a sectarian school as part of a general program that 'is in no way skewed towards religion.'" *Zobrest*, 509 U.S. at 10 (quoting in part *Witters v. Washington Department of Services for Blind*, 474 U.S. at 488). The offering of this service does not run afoul of the Establishment Clause.

Had *Aguilar* originally been decided under the neutrality test, as opposed to the three-part *Lemon* test, the decision would have undoubtably been different. "This court should, in a proper case, be prepared to reconsider *Aguilar*, in order to bring our Establishment Clause jurisprudence back to what I think is the proper track--government impartiality, not animosity, towards religion." *Grumet*, 114 S. Ct. at 2498 (O'Connor, J., dissenting). This Court now has an opportunity to reevaluate New York's implementation of its Title I program under the principle of neutrality. Applying this principle to the facts of this case it becomes clear that the state is acting in a neutral fashion in its dealings with parochial schools and that providing public school teachers to religious students does not violate the Establishment Clause. Allowing Title I funds to flow to parochial schools of different faiths does not treat any particular religion with favoritism, nor does it favor religious schools as a whole over public schools. It simply allows all eligible school children the opportunity to receive an important educational benefit. Because this evenhanded disbursement of funds in no way threatens the establishment of one national religion the Establishment Clause is not violated.

CONCLUSION

In *Aguilar* this Court held that using public money to hire public school teachers to provide remedial instruction to parochial school children in parochial school classrooms violated the Establishment Clause. Although this program

neither favored nor disadvantaged religious schools, the Court held that under the third prong of the *Lemon* test the program resulted in the excessive, and therefore impermissible, entanglement of church and state.

This case provides the Court with an opportunity not only to reconsider the *Aguilar* decision, but also to overrule *Lemon* and reintroduce a degree of consistency to Establishment Clause jurisprudence. In recent terms, this Court has rejected Establishment Clause claims challenging neutral governmental programs. However, by not explicitly overruling *Lemon* this Court has condemned the lower courts to toil under the tree-part test. This Court should expressly overturn *Lemon* and declare that so long as the government remains neutral in its dealings with religion the Establishment Clause is not offended.

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Respectfully submitted,

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